jingles of words are very fashionable of late, and Childe Harold in the fashion; but they are no more than empirical tricks to excite the wonder of superficial admirers, and after they have dazzled the unskilful for a time, and obscured the mild and steady splendour of real beauty, the glare ceases, and the glittering wonder of the moment is neglected and forgotten. It is another fault in these poems, that the subject is often abandoned and lost sight of, in quest of some distant comparison or illustration. This practice is not allowable in the most leisurely pursuit of recreation. We require something like method, and progress, even in our amusements, and if, in an incursion of pleasure, our companion will be running away into the fields for every flower or butterfly he sees, we think him a trifler, and become weary of his company. But one of Lord Byron's greatest and most frequent mistakes consists in his endeavour to give animation to his poetry, by attributing consciousness and intelligence to inanimate objects, which after all show no signs of thought, but remain, in spite of all the writer's efforts to the contrary, inmoveable, dead, material things.

This practice is commonly the resort of a poor invention and cold fancy, but Lord Byron seems to use it out of a love of conceit, and from a want of delicate, discriminating taste.

We take leave of Lord Byron, as we believe most of his readers do, with a regret, that, since he has written so well, he has also written so ill.

ART. VI. *Reports of cases, argued and adjudged in the Supreme Court of the United States. By Henry Wheaton, Counsellor at law. Vol.* i.—Matt. Carey, Phil. 1816.

THE Court, whose decisions are reported in the volume before us, derives from the constitution an extensive and important jurisdiction. Every subject of judicial cognizance, which can in any manner affect our external relations, or our domestick peace, is submitted to its judgment, and that judgment is final. Not only does it contribute, with all the other powers in the government, to the general purposes of the confederacy; it is, in a more peculiar sense, the guardian of constitutional sanity; the power which pre-

serves all others in their due and wholesome exercise; which checks their excesses, corrects their disorders and mistakes; and, like conscience in the moral system, vindicates the authority of the laws, when they are in danger of violation or neglect.

A written constitution would be of little use without such a tribunal. Its restrictions, however clear and positive, would be ineffectual to control the ambitious, and even the errours of men in power would be drawn into precedent, and would gradually undermine the political structure. In maintaining the permanency of our civil institutions, therefore, the agency of the Judiciary is of the highest necessity and moment.

The importance of uniform decisions in matters of common interest, and the real or supposed danger of partiality in the courts of the States, are well known to have been among the principal objects, for which the jurisdiction of the federal courts was given. In the words of Chief Justice Marshall,* "the constitution itself either entertains apprehensions on this subject, or views with indulgence the possible fears and apprehensions of suitors." Whether these apprehensions are well or ill founded, they seem to have been felt, as soon as an attempt was made to unite in a confederated republick. Within a few months after the commencement of the revolutionary war,† Congress exercised its then undefined authority in recommending to the several legislatures, "to erect courts for the purpose of determining concerning captures, and to provide that all trials in such cases be had by a jury," allowing in all cases an appeal to Congress, "or to such person or persons, as they should appoint for the trial of appeals."—The articles of confederation, ratified on the 9th July, 1778, provided that Congress should have the sole and exclusive right "of establishing rules for deciding in all cases, what captures on land or water should be legal," and of "appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures." The same article provides, that all disputes between States, concerning boundary, jurisdiction, or any other cause, and all controversies, concerning the private right of soil, claimed under different grants of two or

* 5 Cra. 87. † 25 Nov. 1775.

more States, should be decided in the last resort by Congress, or appeal.

When the present more national form of government was adopted, the enlargement of the legislative powers made a corresponding extension of the judicial authority indispensable.

"A good law without execution," says Bishop Taylor; "is like a promise unperformed." Such was the fate of the laws, or rather recommendations of the Congress, deriving its powers from the articles of confederation; and such, without a court of commensurate jurisdiction, must have been that of the most salutary acts of legislative power, under our existing constitution. Whether the present organization of the federal judiciary be the most convenient and proper, and what danger there may be of an inordinate increase of its authority, we have not time to examine. There are certainly very serious objections to some parts of the system, and the example of English courts established originally for special and definite purposes, but by means of fictions, and the consent of parties, gradually embracing in their jurisdiction almost every kind of controversy, may lead some to apprehend a similar growth of power in the courts of the United States. Thus far there has been no indication, sufficiently unequivocal to be a just cause of alarm, of a disposition in the federal judiciary, to extend its authority beyond those limits, which are sanctioned by the fair and legitimate construction of the constitution. Whenever such a disposition shall be apparent, a powerful barrier against encroachment will, we trust, be found in the courts of the several States.

Among the means, which may best serve to keep both the federal and state courts within their proper bounds, correct reports of their respective decisions may certainly be numbered. Conflicts will be less likely to arise, when each knows the limits, which the other assigns to its authority. They will mutually enlighten and assist each other in the construction of that constitution, under which they act, and either may draw back when it finds that incautiously or from the natural love of power, it has stepped upon doubtful and disputed ground. From the peculiar structure of our government, the national and state judiciaries are both supreme within their respective spheres. There is no common arbiter. And hence the importance of preventing controversies, of which the end cannot be foreseen.

For this reason, as well as on account of the general interest which belongs to the reports of a court, in which so many novel and important questions are discussed, we heard with real pleasure of the appointment of Mr. Wheaton to the office of reporter, and of the resolution of Mr. Cranch to publish the cases from the close of his sixth volume to the commencement of Mr. Wheaton's labours. These last, as well as Mr. Wheaton's volume, are now before the publick; but our limits, and the imperfect examination we have been able to give them, will admit of our noticing them but slightly.

The duty of a reporter was formerly much more arduous and responsible, than it now is. He was obliged to catch the words, as they fell from the lips of the judges, and to transfer them to his page, there to remain as a guide to those, who in after times should be entrusted with the administration of justice. It was not strange, that he should often err, and that many of the limitations and restrictions which accompanied the opinion should be omitted in the report. We are told by Master Plowden, "that there were anciently four reporters of cases in law, who were chosen and appointed for that purpose, and had a yearly stipend from the king for their trouble therein; which persons used to confer all together at the making and collecting of a report, and their report, being made and settled by so many, and by men of such approved learning, carried great credit with it, as indeed it ought." This cautious method, however, continued but a short time. Of late years, the practice has been for the judges themselves, upon questions of any importance, to reduce their opinions to writing. Very little is left for the reporter, but to give a clear statement of the facts, and an accurate and faithful account of the arguments of counsel. His title to praise must of course be as limited as his exposure to blame. But what the reporter loses in reputation is gained to the publick in the increased assurance of the fidelity of the report, the more full exposition of the reasons, on which the decision is founded, and the more exact definition of its extent and boundaries.

Mr. Wheaton, however, has not confined himself within the humble limits, to which the mere exercise of his duty as a reporter would have restricted him. With a laudable ambition, he seems resolved to assert a higher claim to reputation, than would be consistent with the bare delineation of

arguments, which are not his own, and for the ability or defects of which he of course is not responsible. He has scattered through his volume notes upon some of the most important points connected with the cases reported, in which he has given a compendious view of the law, as it is to be found in the most approved foreign writers. Most of these relate to maritime law, and to the jurisdiction and practice of the admiralty in matters of prize and revenue. They are in general well executed, and will be valuable aids to the student in directing him to the sources of legal information.

Two notes of considerable length are inserted in the appendix. The first, containing a sketch of the practice in prize causes, will be found useful, if we should unfortunately be engaged in another war. The other is an historical deduction of the rule of war of 1756, from its origin down to the late orders in council. This note contains much useful information, and discovers an ingenuity and extent of research highly creditable to the author. Its object is to prove, 1. That the rule had not been recognized or applied at any period earlier than the war of 1756. 2. That in its origin, it was confined to cases of such complete identification with the enemy's interests, as to give a hostile character to the property. 3. That the rule, whatever it was, was suffered to slumber during the war of the American revolution. 4. That when revived in the war of the French revolution, "the sphere of its activity was enlarged," beyond even the instructions of the executive government. How far Mr. W. has succeeded in proving these points, is a question which it would be inconsistent with the object of this review to discuss. There is, however, reported in this volume a case, which we are apprehensive will be employed as a powerful argument against our neutral claims, in the event of a future European war. We allude to the case of the *Commercen*, (p. 382.) The question in this case was, whether this vessel, being Swedish, and having been captured in transporting grain, the property of British subjects, from Ireland to Spain, by the special permission of the British government, and as appeared from the papers, for the use of the British forces there, was entitled to freight. The claim of the neutral owner for freight was rejected by a majority of the court.* Now, it is true, that this decision does not pro-

* By four judges against three, Marshall, Livingston, and Johnson dissenting.

fess to be founded upon the principle, that no trade is to be allowed to the neutral in war, which is prohibited to him in peace, but upon the ground, that being engaged in transporting provisions for the use of the forces of our enemy, though not acting against us, but in another and distinct war, he is to be considered as much incorporated with that enemy, as if he had been carrying his despatches, or transporting his troops. It would not become us to question the correctness of this reasoning. But there are certainly arguments of no inconsiderable weight, which may be opposed to it by the future belligerent, when our own citizens shall be in the situation of the Swedish claimant. These arguments cannot be better expressed, than in the words used by C. J. Marshall, (p. 402) in explaining the reasons of his dissent.

"The inquiry, then, whether the act, in which this individual Swede was employed, would, if performed by his government, have been considered an act of hostility to the United States, and might rightfully be so considered, is material to the decision of the question, whether the act of the individual is to be treated as hostile. Great Britain and Sweden were allies in the war against France. Consequently, the king of Sweden might have ordered his troops to cooperate with those of Britain, in any place, against the common enemy. He might have ordered a reinforcement to the British army on the peninsula, and this reinforcement might have been transported by sea. An attempt on the part of the United States to intercept it, because it was aiding their enemy, would certainly have been an interference in the war in Europe, which would have provoked and would have justified the resentment of all the allied powers. It would have been an interference, not to be justified by our war with Britain, because those troops were not to be employed against us. If, instead of a reinforcement of men, a supply of provisions was to be furnished in that part of the allied army, which was British, would that alter the case? Could an American squadron intercept a convoy of provisions, or of military stores, of any description, going to an army engaged in a war common to Great Britain and Sweden, and not against the United States? Could this be done without interfering in that war, and taking part in it against all the allies? If it could not, then any supplies furnished by the government of Sweden, promoting the operations of their common war, whether intended for the British, or any other division of the allied armies, had a right to pass unmolested by American cruisers. It is not believed that any act, which, if performed by the government, would not be deemed an act of hostility, is to be so deemed if

performed by an individual. Had the provisions, then on board the *Commercen*, been Swedish property, the result of this reasoning is, that it would not have been confiscated as prize of war. Being British property, it is confiscable; but the Swede is guilty of no other offence than carrying enemy's property, an offence not enhanced in this particular case by the character of that property. He is, therefore, as much entitled to freight, as if his cargo had been of a different description."

It ought to be stated, however, that the Chief Justice declares that it was not without difficulty he came to this conclusion.

Among the constitutional questions, which have been agitated from time to time in the courts of the United States, by far the most interesting and momentous is that of the power of those courts to take cognizance of crimes and offences not defined by the constitution, or by statutes made in pursuance of it. In the case of an indictment before the Circuit Court of Pennsylvania for attempting to bribe a commissioner of the revenue, (2 *Dall.* 393,) Judge Chase declared that, in his opinion, "the United States, as a federal government, had no common law, and consequently no indictment could be maintained in their courts for offences merely at the common law." The point has been argued on several occasions since that time, and particularly in the celebrated trial of Col. Burr before the Circuit Court at Richmond. It had not, however, been decided by the Supreme Court until the case of the *United States* vs. *Hudson & Goodwin*, reported in 7 *Cranch*, 32. This was an indictment for a libel on the Congress of the U. S. and the question of jurisdiction was certified on general demurrer from the Circuit Court of Connecticut. *Pinckney*, Attorney General, for the U. S. and *Dana*, of counsel for the defendants, both declined arguing. The court decided against the jurisdiction, and Judge Johnson delivered an opinion, explaining the reasons of this decision. It was supposed that the question was then at rest; but in the volume now under review, in the case of *United States* vs. *Coolidge*, (p. 415,) it is brought again before the court, and though the former decision is not overruled, yet from the intimations of several of the judges, the point may be considered as still open for discussion. It cannot be too much regretted, that a question of so much importance, should thus remain unsettled; especially as it involves the exist-

ence or non-existence of an entire code of criminal justice. In this uncertainty and division of opinion, we can only refer such, as take an interest in the subject, to the able and learned opinion of the Hon. Judge Story in favour of the jurisdiction, reported in 1 *Cir. Court Rep.* 415, and to the opinion before mentioned of the Hon. Judge Chase, to the arguments in Burr's case, and a note of Judge Tucker, annexed to his edition of Blackstone, for the reasoning in support of the opposite doctrine.

We had intended to give a view of the arguments on each side of the interesting question which arose in the case of *Martin* vs. *Hunter's lessee*, reported in this volume, (p. 305.) But we must hasten to the close of this article. We will merely inform the reader, that in the case referred to, the constitutionality of that section of the judiciary law, which authorizes the revision in certain cases of the decrees and judgments of courts of the States by the Supreme Court of the United States, was contested by the Court of Appeals of the State of Virginia; who refused to obey a mandate for the Supreme Court, reversing their judgment in a cause of great magnitude, involving the title to a large tract of land, which the State of Virginia had seized, during the revolutionary war, and had granted to several purchasers. An elaborate opinion was delivered by Story J. the result of which was, that the court, in pursuance of the powers given by the statute, proceeded to execute its own judgment without a second mandate to the Court of Appeals.

This has therefore become a controversy between Virginia and the United States. It remains to be seen, whether that State will, as Pennsylvania did in the case of the executors of Rittenhouse, oppose by force the execution of the decree.

We are disposed to say very little as to the manner in which Mr. Wheaton has reported the arguments of counsel. "Nec enim reprehendere libet, nec laudare possumus." Their general defect is in stating positions, rather than the reasoning and illustrations, by which they are supported. In some instances, they are very fully and ably reported. Mr. Wheaton's own argument, and that of his antagonist in the case of the *Antonia*, and *Mr. Hunter's* in that of *Ammidon* vs. *Smith & al.* may be mentioned as examples.

Mr. Wheaton has, we think, been unfortunate in attempting sometimes to preserve the coruscations of fancy, with

which the orator has sought to decorate his discourse. These, however proper and becoming at the bar, are entirely out of place in the report of a law case. It is hardly possible to retain them accurately, and their effect depends so much on what precedes and follows, that a figure, very beautiful when delivered, may appear distorted and awkward in the brief sketch, to which a reporter is limited. We felt this painfully in reading the succession of indistinct and confused images, which close the argument of that eminent civilian and orator, who was of counsel for the defendant in errour in the case of *Martin* vs. *Hunter's lessee.**

We believed that though here and there might be a word of his pronouncing, the whole could be but the mutilated likeness of his eloquence; the broken and disjointed limbs of a form once beautiful. Who, that has been accustomed to the oratory of Mr. Dexter, can suppose the following sentences to have passed his lips.

"I have long inclined to the belief, that the centrifugal force was greater than the centripetal. The danger is, not that we shall fall into the sun, but that we may fly off in eccentrick orbits, and never return to our perihelion. But though I will struggle to preserve all the constitutional powers of the national government, I will not strain and break the constitution itself in order to assert them; there is danger too on that side. The poet describes the temple of Fame as situated on a mountain covered with ice. The palaces of power are on the same frail foundation; the foot of adventurous ambition often slips in the ascent, and sometimes the volcano bursts, and inundates with its lava the surrounding country."

Who does not perceive, that though some few strokes of the picture may be from the pencil of that distinguished master, yet it wants the tint and colouring, which were the chief constituents of its beauty; which softened its glare, and gave consistency and harmony to the whole?—We do not mean, however, to accuse Mr. Wheaton of any want of skill in the execution of this attempt. We believe very few would have done it so well. The truth is, that a painter may as well hope to imitate on his canvass the changes of the evening cloud, as a law reporter to preserve, in their force, distinctness and beauty, the displays of imagination that are sometimes made in a legal argument.

* p. 320, 321.

Upon the whole, we are well satisfied with the manner, in which Mr. W. has commenced his labours, and shall look with impatience for a second volume.

ART. VII. *Memoria sullo scovrimento di un antico sepolcreto Greco-Romano, di Lorenzo Justiniani.* In Napoli, 1812, pp. 193.

THE study of antiquities is no where more generally cultivated or more highly respected, than in Italy. Surrounded by the ruins of lost empire and the memorials of departed glory, which are at once their pride and their reproach, its present inhabitants regard every relick of their boasted ancestors with natural but almost superstitious veneration. This sentiment is heightened by witnessing the zeal of the hosts of foreigners, who annually cross the Alps, and descend into this delightful country, not like its former invaders to insult and plunder it, but to increase the gaiety of its cities; to add something to the scanty property of the people; to admire its edifices, superiour even in ruins to the most finished productions of modern architecture, and to indulge in that glowing enthusiasm, which is kindled by the consciousness of standing on the very spots, where exploits were achieved, that elevate the dignity of human nature.

This study is further recommended by the opportunity, which it affords of ascertaining the social character and domestick occupations of the ancients; the amusements of their leisure hours, those little every day occurrences, which bear a stronger resemblance to the realities of our own lives, and excite a more lively conviction that they were of the same species of beings as ourselves. The fact too that the relicks of their skill in the arts surpass the labours of the moderns even more than the deeds related of them surpass the ordinary events of our degenerate days, gives an additional credibility to their history, and affords indirect but persuasive evidence of the actual performance of the achievements ascribed to this wonderful people.

The discoveries of the antiquary tend also to elucidate obscure passages in the writings of the ancients, still the models of taste, the first objects of our serious study, and the guides of our earliest literary efforts.